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ABSTRACT

"Affirmative action" is the term typically used to refer to two contrasting values: the value of equal opportunity and the value of equal results. The Justice Department under the Reagan Administration, however, draws a clear distinction between the two, and is committed to the "original" meaning of affirmative action. That is, the Administration supports the principle that individuals previously neglected in the search for talent must be allowed to apply and be considered along with all others for available jobs or contracting opportunities, but that hiring and selection decisions would be made from the pool of applicants without regard to race, creed, color, sex, or national origin. The administration rejects the remedial use of goals, quotas, or other such numerical devices designed to achieve a particular balance as to race or sex in the workforce. This position is supported by a recent Supreme Court decision (Firefighters' Local Union v. Stotts) and policy considerations. In terms of policy, it is incorrect to equate underrepresentation with discrimination. In addition, it is neither remedial nor equitable to require the hiring, promotion, or retention of a person who has not suffered discrimination solely because that person is a member of a group that might have been discriminated against. Finally, racial quotas and other preferential treatment unjustifiably infringe on the legislative interests of third parties, such as incumbent employees. To sum up, wherever it occurs and however it is explained, no action disadvantaging a person because of color or gender is affirmative. (GC)

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REMARKS

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BEFORE

THE

AFFIRMATIVE ACTION ASSOCIATION

THE WESTIN HOTEL
CHICAGO, ILLINOIS
THURSDAY, SEPTEMBER 20, 1984
11:30 A.M.

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Affirmative action is certainly a subject of vital significance for our society. The character of our country is determined in large part by the manner in which we treat our individual citizens -- whether we treat them fairly or unfairly, whether we ensure equal opportunity to all individuals or guarantee equal results to selected groups. In my work as the Assistant Attorney General, I am faced daily with what seem to have emerged on the civil rights horizon as the two predominant competing values that drive the debate on today's topic for discussion -- that is, the value of equal opportunity and the value of equal results -- and I have given a great deal of time and attention to the very different meanings they lend to the phrase "affirmative action."

Typically -- to the understandable confusion of almost everyone -- affirmative action is the term used to refer to both of these contrasting values. There is, however, a world of difference between "affirmative action" as a measure for ensuring equality of opportunity and "affirmative action" as a tool for achieving equality of results.

In the former instance, affirmative steps are taken so that all individuals (whatever their race, color, sex or national origin) will be given the chance to compete with all others on equal terms; each is to be given his or her place at the starting line without advantage or disadvantage. In the

latter, by contrast, the promise of affirmative action is that those who participate will arrive at the finish in pre-arranged places -- places allocated by race or sex.

I have expressed on a number of occasions my conviction that the promise of equal results is a false one. We can never assure equal results in a world in which individuals differ greatly in motivation and ability; nor, in my view, is such a promise either morally or constitutionally acceptable. This was, in fact, well understood at the time that the concept of "affirmative action" was first introduced as a remedial technique in the civil rights arena. In its original formulation, that concept embraced only non-preferential affirmative efforts, in the nature of training programs and enhanced recruitment activities, aimed at opening wide the doors of opportunity to all Americans who cared to enter. Thus, President Kennedy's Executive Order 10925, one of the earliest to speak of the subject -- stated that federal contractors should "take affirmative action to ensure that the applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."

This principle was understood by all at that time to mean simply that individuals previously neglected in the

search for talent must be allowed to apply and be considered along with all others, for available jobs or contracting opportunities, but that the hiring and selection decisions would be made from the pool of applicants without regard to race, creed, color, or national origin -- and later sex. No one was to be afforded a preference, or special treatment, because of group membership; rather, all were to be treated equally as individuals based on personal ability and worth.

This Administration is unswerving in its commitment to carrying out this "original and undefiled meaning" -- as Morris Abram, Vice Chairman of the Civil Rights Commission calls it -- of "affirmative action." Where unlawful discrimination exists, we see that it is brought to an abrupt and uncompromising halt; where that discrimination has harmed any individual, we ensure that every victim of the wrong-doing receives "make whole" relief; and affirmative steps are required in the nature of training programs and enhanced recruitment efforts to force open the doors of opportunity that have too long remained closed to far too many.

The criticism, of course, is that we do not go far enough. The remedial use of goals, quotas, or other such numerical devices -- designed to achieve a particular balance

as to race or sex in the workforce -- has been accepted by the lower Federal courts as an available instrument of relief, and therefore, we are told, such an approach should not be abandoned. There are several responses to this sort of argumentation.

The first is a strictly legal one, and rests on the Supreme Court's recent decision in Firefighters Local Union v. Stotts, No. 82- 206 (decided June 12, 1984). The Supreme Court in Stotts did not merely hold that federal courts are prohibited from ordering racially-preferential layoffs to maintain a certain racial percentage, or that courts cannot disrupt bona fide seniority systems. To be sure, it did so rule; but the Court said much more, and in unmistakably forceful terms. As Justice Stevens remarked during his recent commencement address at Northwestern University, the decision represents "a far-reaching pronouncement concerning the limits on a court's power to prescribe affirmative action as a remedy for proven violations of Title VII of the Civil Rights Act.' For, the Stotts majority grounded the decision, at bottom, on the holding that federal courts are without any authority under Section 706(g) -- the remedial provision of Title VII -- to order a remedy, either by consent decree or after full litigation, that goes beyond "make whole" relief for actual

victims of the discrimination. Thus, quotas or other preferential techniques that, by design, benefit nonvictims because of race or sex, cannot be a part of Title VII relief ordered in a court case, whether the context is hiring, promotion or layoffs.

A brief review of the opinion's language is particularly useful to understanding the sweep of the decision. At issue in Stotts was a district court injunction ordering that certain white firefighters with greater seniority be laid off before blacks with less seniority in order to preserve a certain percentage of black representation in the fire department's workforce. The Supreme Court held that this order was improper because "there was no finding that any of the blacks protected from layoff had been a victim of discrimination." Slip op. at p. 16. Relying explicitly on Section 706(g) of Title VII, the Court held that Congress intended to "provide make-whole relief only to those who have been actual victims of illegal discrimination." Slip op. at p. 17.

Specific portions of the legislative history of the Act were cited in support of this interpretation. For example, Hubert Humphrey, the principal force behind passage of Title VII in the Senate, had assured his colleagues during consideration of the statute that:

> [T]here is nothing in [the proposed bill] that will give any power to the Commission or to any court to require hiring, firing or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance . . . . That bugaboo has been brought up a dozen times; but it is nonexistent.

110 Cong. Rec. 6549 (1964) (emphasis added). Moreover, the Court recognized that the interpretive memorandum of the bill entered into the Congressional Record by Senators Clark and Case stated unambiguously that "Title VII does not permit the ordering of racial quotas in business or unions." Id. at 6566 (emphasis added by Court).

After Stotts, it is abundantly clear that Section 706(g) of Title VII does not tolerate remedial action by courts that would grant to nonvictims of discrimination -- at the expense of wholly innocent employees or potential employees -- an employment preference based solely on the fact that they are members of a particular race or gender. Quotas, or any other numerical device based on color or sex, are by definition victim-blind: they embrace without distinction nonvictims as well as victims of unlawful discrimination and accord preferential treatment to persons having no claim to "make-whole" relief. Accordingly, whether such formula are employed for hiring, promotion, layoffs or otherwise, they must fail under any reading of the statute's remedial provision.

There are equally strong policy reasons for coming to this conclusion. The remedial use of preferences has been justified by the courts primarily on the theory that they are necessary to cure "the effects of past discrimination" and thus, in the words of one Supreme Court Justice, 1/ to "get beyond racism." This reasoning is twice flawed.

First, it is premised on the proposition that any racial imbalance in the employer's work force is explainable only as a lingering effect of past racial discrimination. The analysis is no different where gender-based discrimination is involved. Yet, in either instance, equating "underrepresentation" of certain groups with discrimination against those groups ignores the fact that occupation selection in a free society is determined by a host of factors, principally individual interest, industry and ability. It simply is not the case that applicants for any given job come proportionally qualified by race, gender, and ethnic origin in accordance with U.S. population statistics. Nor do the career interests of individuals break down proportionally among racial or gender groups. Accordingly, a selection process free of discrimination is no more likely to produce "proportional representation" along race or sex lines than it is to assure proportionality among persons grouped according to hair color, shoe size, or any other irrelevant personal characteristic.

1/ University of California Regents v. Bakke, 438 U.S. 265, 407 (Blackmun, J., corcurring)

No human endeavor, since the beginning of time, has attracted persons sharing a common physical characteristic in numbers proportional to the representation of such persons in the community. "Affirmative action" assumptions that one might expect otherwise in the absence of race or gender discrimination are ill-conceived.

Second, and more important, there is nothing remedial -- let alone equitable -- about a court order that requires the hiring, promotion, or retention of a person who has not suffered discrimination solely because that person is a member of the same racial or gender group as other persons who were victimized by the discriminatory employment practices. The rights protected under Title VII belong to individuals, not to groups. The Supreme Court made clear some years ago that "[t]he basic policy of [Title VII] requires that [courts] focus on fairness to individuals rather than fairness to classes." Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 708 (1978). The same message was again delivered in Stotts. As indicated, remedying a violation of Title VII requires that the individual victimized by the unlawful discrimination be restored to his or her "rightful place."

It almost goes without saying, however, that a person who is not victimized by the employer's discriminatory practices has no claim to a "rightful place" in the employer's workforce. And, according preferential treatment to nonvictims of discrimination in no way remedies the injury suffered by persons who have been discriminated against in violation of Title VII.

Moreover, racial quotas and other forms of preferential treatment unjustifiably infringe on the legitimate employment interests and expectations of third parties, such as incumbent employees, who are free of any involvement in the employer's wrongdoing. To be sure, awarding retroactive seniority and other forms of "rightful place" relief to individual victims of discrimination also unavoidably infringes upon the employment interests and expectations of innocent third parties. Indeed, this fact has compelled some, including Chief Justice Burger, to charge that granting rightful place relief to victims of racial discrimination is on the order of "robbing Peter to pay Paul." Franks v. Bowman Transportation Co., 424 U.S. 747, 781 (1976) (Burger, C.J., dissenting).

The legitimate "rightful place" claims of identifiable victims of discrimination, however, warrant imposition of a

remedy that calls for a sharing of the burden by those innocent incumbent employees whose "places" in the workforce are the product of, or at least enhanced by, the employer's unlawful discrimination. Restoring the victim of discrimination to the position he or she would have occupied but for the discrimination merely requires incumbent employees to surrender some of the largesse discriminatorily conferred upon them. In other words, there is justice in requiring Peter, as a kind of third-party beneficiary of the employer's discriminatory conduct, to share in the burden of making good on the debt to Paul created by that conduct. But, an incumbent employee should not be called upon as well to sacrifice or otherwise compromise legitimate employment interests in order to accommodate persons never wronged by the employer's unlawful conduct. An order directing Peter to pay Paul in the absence of any proof of a debt owing to Paul is without remedial justification and cannot be squared with basic notions of fairness.

Proponents of the so-called remedial use of class-based preferences often counter this point with a two-fold response. First, they note that the effort to identify and make whole all victims of the employer's discriminatory practices will never be 100% successful. While no one can dispute the validity of this unfortunate point, race- and gender-conscious preferences simply do not answer this problem.

The injury suffered by a discriminatee who cannot be located is in no way ameliorated -- much less remedied -- by conferring preferential treatment on other, randomly selected members of his or her race or sex. A person suffering from appendicitis is not relieved of the pain by an appendectomy performed on the patient in the next room.

Second, proponents of judicially imposed numerical preferences also argue that they are necessary to ensure that the employer does not return to his discriminatory ways. The fallacy in this reasoning is self-evident. Far from preventing future discrimination, imposition of such remedial devices guarantees future discrimination. Only the color or gender of the ox being gored is changed.

It is against this backdrop that the Court's decision in Stotts was greeted so enthusiastically in many quarters last spring. The inescapable consequence of Stotts is to move government at the federal, state and local levels noticeably closer to the overriding objective of providing all citizens with a truly equal opportunity to compete on merit for the benefits that our society has to offer -- an opportunity that allows an individual to go as far as that person's energy, ability, enthusiasm, imagination and effort will allow, and not be hemmed in by the artificial allotment given to his or her group in the form of a numerical preference.

The promise is that we might now be able to bring an end to that stifling process by which government and society view its citizens as possessors of racial or gender characteristics, not as the unique individuals they are; where advancements are viewed not as hard-won achievements, but as conferred "benefits."

Let me conclude where I started. The use of race or sex in an effort to restructure society along lines that better represent someone's preconceived notions of how our limited educational and economic resources should be allocated among the many groups in our pluralistic society necessarily forecloses opportunities to those having the misfortune -- solely by reason of gender or skin color -- to be members of a group whose allotment has already been filled. Those so denied, such as the more senior white Memphis firefighters laid off to achieve a more perfect racial balance in the fire department, are discriminated against every bit as much as the black Memphis firefighters originally excluded from employment. In our zeal to eradicate discrimination from society, we must be ever vigilant not to allow considerations of race or sex to intrude upon the decisional process of government. That was precisely the directive handed down by Congress in the Civil Rights Act of 1964, and, as Stotts made clear, the command has full application to the courts.

Plainly, "affirmative action" remedies must be guided by no different principle. For the simple fact remains that wherever it occurs, and however explained, "no discrimination based on race [or sex] is benign . . . . no action disadvantaging a person because of color [or gender] is affirmative. 2/

Thank you.

2/ United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 254 (1979) (J. Rehnquist, dissenting).

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